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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1943.

No. 911-913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

vs.

*Petitioners,*

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DeRAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

*Respondents.*

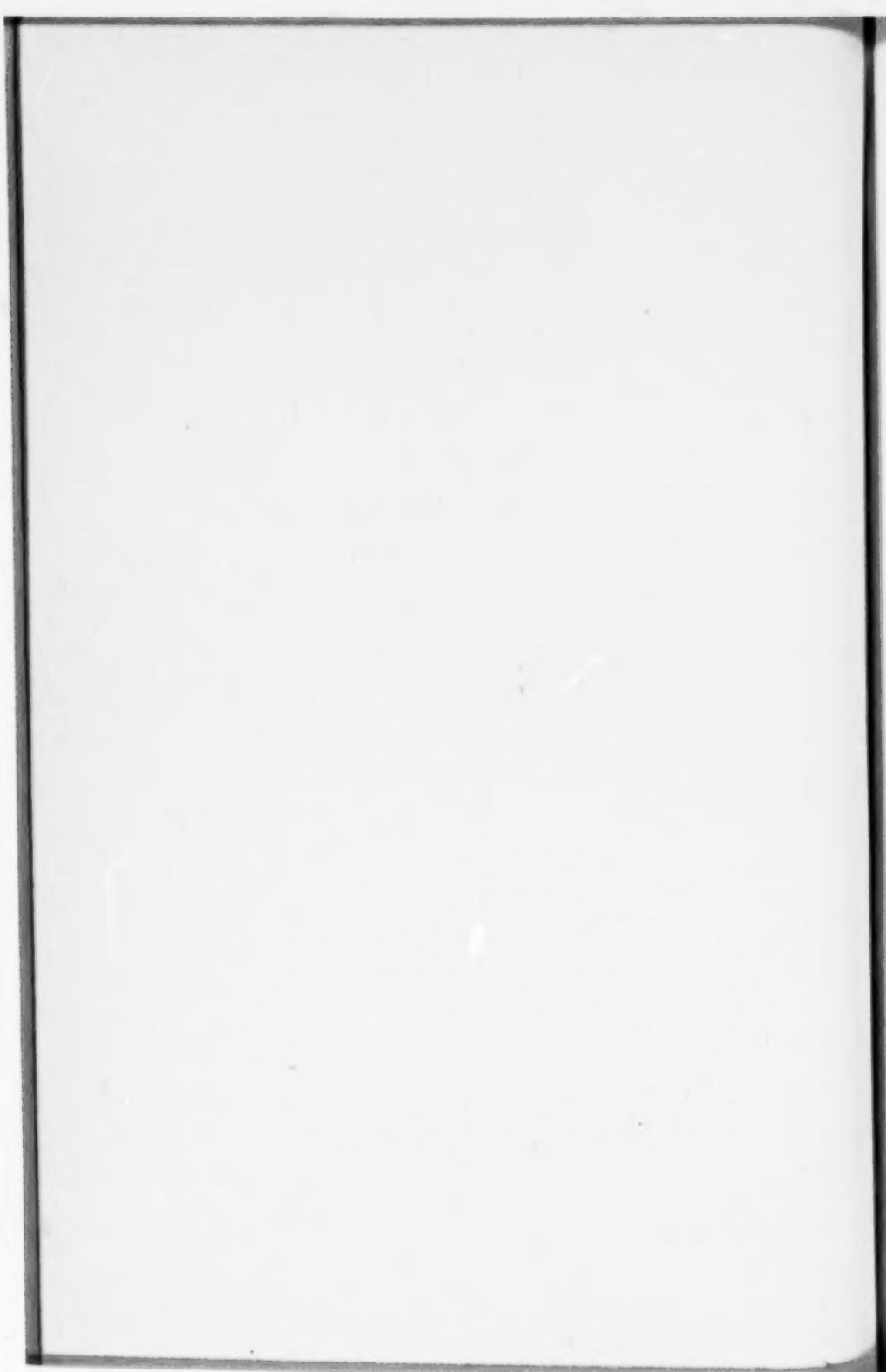
**BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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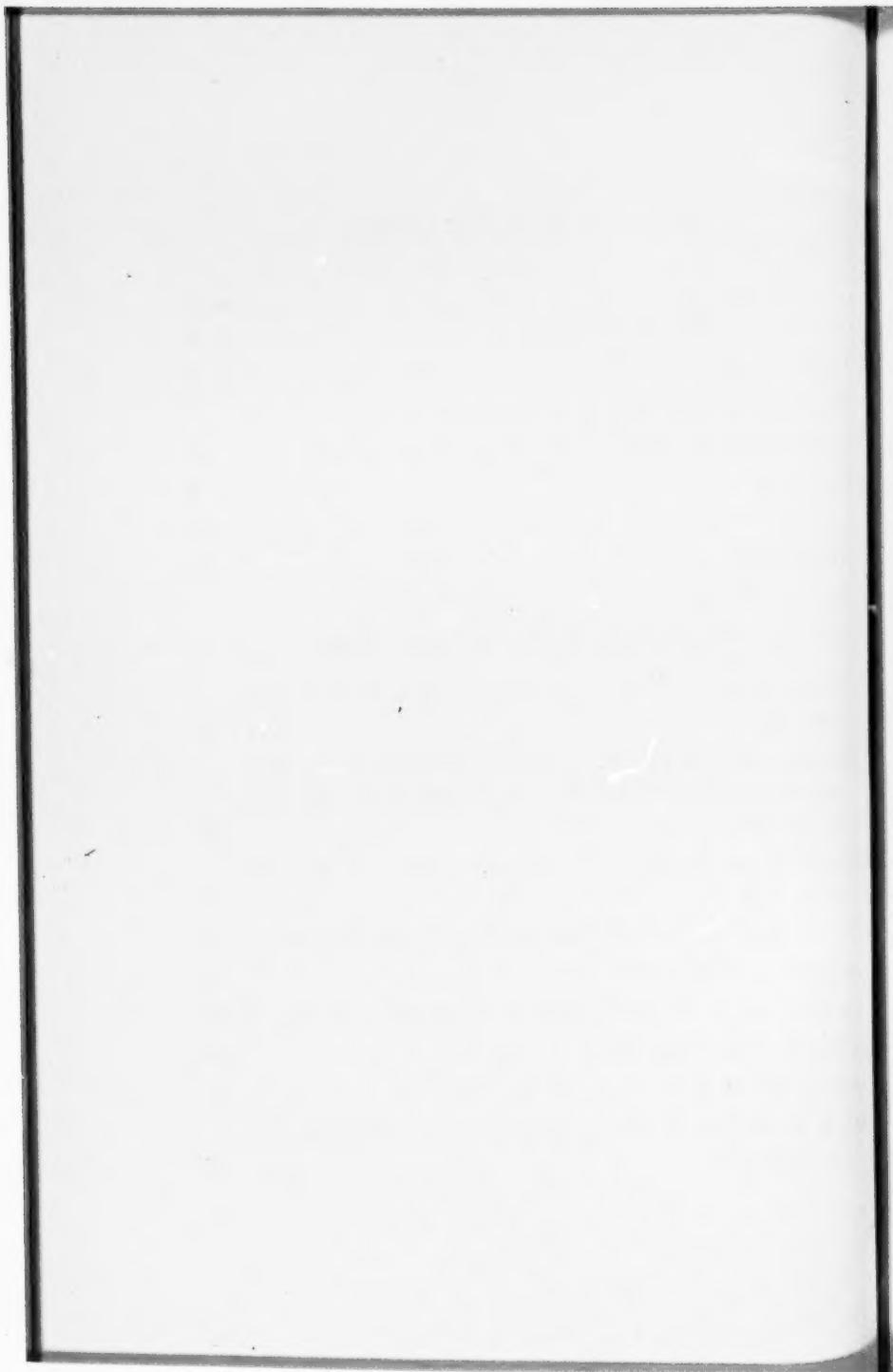


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*vs.* *Petitioners,*

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

*Respondents.*

## BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

Chicago & Eastern Illinois Railroad Company and Wabash Railroad Company, petitioners, herewith submit their brief and argument in support of their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

**Opinions of the Courts Below.**

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, rendered June 2, 1941 and filed June 17, 1941 (R. 382; Appendix, 22) is not reported.

The March 17, 1943 opinion of the United States Circuit Court of Appeals for the Seventh Circuit in appeals Nos. 7875, 7876 and 7877 (R. 710; Appendix, 1) is reported in 140 F. 2d 120.

The March 19, 1943 opinion of said Circuit Court of Appeals in appeal No. 7878 (Appendix, 12) is reported in 140 F. 2d 126.

The January 21, 1944 opinion of said Circuit Court of Appeals in appeals Nos. 7875, 7876, 7877 and 7878 (R. 944; Appendix, 18) is reported in 140 F. 2d 130.

**Jurisdiction.**

The grounds for the jurisdiction of this Court are set forth in the petition (p. 17).

## STATEMENT OF THE CASE.

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The facts are sufficiently set forth in the petition (pp. 3-16). For convenience, the same short terms used in the petition to designate the Courts, the parties, other lessees, the instruments and certain phrases therein will be used in this brief.

## SPECIFICATION OF ERRORS.

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If the writ is granted, petitioners will urge that the Circuit Court erred in the following respects:

- (1) In reversing the decree of the District Court.
- (2) In not holding that since 1902 the definition of wheelage expenses in paragraph 33 of the 1902 Lease has been and presently is the controlling definition of such expenses.
- (3) In not holding that since 1902 the method of apportioning wheelage expenses provided in paragraph 33 of the 1902 Lease has been and presently is the controlling method.
- (4) In holding that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease did not supersede and abrogate paragraph 6th of the 1882 Agreement.
- (5) In holding that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease did not supersede and abrogate paragraph 5th of the 1882 Agreement.
- (6) In holding that the 1902 Agreement was merged in the 1902 Lease.
- (7) In not giving any force or effect to the 1902 Agreement.

(8) In not applying the Illinois rule of law which requires that the provisions in a later agreement, covering the same subject matter but inconsistent with the provisions of an earlier agreement, supersede and abrogate such earlier provisions.

(9) In holding that paragraph 37 of the 1902 Lease related to or in any manner affected the 1882 Agreement.

(10) In holding that paragraph 37 of the 1902 Lease related to or in any manner affected paragraphs 5th and 6th of the 1882 Agreement.

(11) In holding that paragraph 33 of the 1902 Lease did not come within the exception clause of paragraph 37 of said lease.

(12) In holding that paragraph 33 of the 1902 Lease did not affect the "all inclusive clause" in paragraph 6th of the 1882 Agreement.

(13) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding.

(14) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding because of the provisions of paragraph 6th of the 1882 Agreement.

(15) In holding that the five tenant owners are liable on a wheelage basis for any of the expenses involved in this proceeding because of the "all inclusive clause" in paragraph 6th of the 1882 Agreement.

(16) In not holding that any of the expenses involved in this proceeding come within that language in paragraph 6th of the 1882 Agreement which excludes certain expense items therein designated from the definition of wheelage expenses in said paragraph.

(17) In failing to hold that the expenses involved in

this proceeding are not within the definition of wheelage expenses in paragraph 33 of the 1902 Lease.

(18) In failing to decide the question which the Circuit Court designated as being the only question in the case.

(19) In failing to decide the five important questions stated at page 19 of the petition.

(20) In failing to give effect to the many stipulated facts, including, among others, those bearing on the intention of the parties as evidenced by their conduct for a period of over thirty years.

(21) In denying the petition for leave to present newly discovered evidence.

(22) In denying the petition for rehearing.

## SUMMARY OF ARGUMENT.

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### POINT I.

The Circuit Court reversed the judgment of the District Court upon a theory original with the Court and patently erroneous. In so doing, it has so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision. (*Infra*, p. 8.)

### POINT II.

Although the Circuit Court propounded for its ultimate determination a single question, it entirely ignored and failed to decide such question. In so doing, the Circuit Court has again so far departed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision. (*Infra*, p. 17.)

### POINT III.

The Circuit Court has rendered conflicting decisions on separate appeals, and conflicting decisions on the same appeals as well, from the same decree, on the same stipulated facts and involving the same instruments. This is an even more serious conflict than one between decisions of Circuit Courts of Appeal of different circuits, and is a further departure from the accepted and usual course of judicial proceedings warranting the exercise by this Court of its power of supervision. (*Infra*, p. 18.)

**POINT IV.**

Although a declaratory judgment was sought, the Circuit Court left undecided several questions which, although argued, are important only because of the erroneous decision of that Court. If upon review this Court reverses such decision, all of these questions will disappear; otherwise, further litigation is inevitable. (*Infra*, p. 24.)

**POINT V.**

The importance of the case is such as to warrant the exercise by this Court of its power of supervision. (*Infra*, p. 28.)

## ARGUMENT.

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### POINT I.

**The Circuit Court Reversed the Judgment of the District Court Upon a Theory Original With the Court and Patently Erroneous. In So Doing, It Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of This Court's Power of Supervision.**

In its March 17, 1943 opinion the Circuit Court states that the seriously argued question, on which petitioners had to rely in order to prevail, is "the cancellation (or abrogation) of the 1882 agreement by the 1902 agreement" and that the District Court, appreciating its importance, had met the question squarely and held that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease had superseded and abrogated paragraphs 5th and 6th of the 1882 Agreement and the various provisions in prior leases concerning wheelage expenses (R. 718; Appendix, 8-9). The Court thus recognized that the fundamental and controlling question presented for decision is: Which is the controlling lease or contract provision which has, since 1902, defined the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis and provided the method of apportionment thereof?

In said opinion the Court decided that the definition of such expenses is controlled by the "all inclusive clause" appearing in paragraph 6th of the 1882 Agreement, and that the five tenant owners are therefore liable for all of the expense items involved on a wheelage basis (R. 720-721; Appendix, 10-11).

The theory upon which the Court reached this decision

was that the reference in paragraph 37 of the 1902 Lease to "said existing leases" referred to and included the 1882 Agreement; that paragraphs 5th and 6th of said 1882 Agreement were thereby preserved, except insofar as they were specifically changed by the 1902 Lease; and that the "all inclusive clause" in paragraph 6th was not affected by paragraph 33 of said 1902 Lease (R. 718-721; Appendix, 9-11).

This theory is both original with the Court and patently erroneous.

#### (1) The Theory Is Original With the Court.

The foregoing theory was neither raised nor urged in the Circuit Court by any of the respondents herein; it was not advanced in the Statement of Points on Appeal (R. 454-462, 467-475, 479-481, 486-494) or in any pleading filed by any such respondent in the District Court; neither does it appear anywhere in the findings of fact (R. 401-435), conclusions of law (R. 435-440), opinion (R. 382-389) or decree (R. 442-447) of the District Court.

The brief filed by Grand Trunk and Monon in the Circuit Court\* clearly reveals that their position was exactly the opposite of the theory originated by that Court. These respondents there stated (pp. 55-56):

"Moreover, the references in the Joint Supplemental Lease of 1902 to prior contracts between the parties were, with one exception, limited to prior *leases* (T. 530); the 1882 Intertenant Agreement was *nowhere mentioned*. In fact, the only mention made of *any* prior *agreement* (as distinguished from 'lease') was the Agreement of November 1, 1891. This agreement, however, had nothing whatever to do with the 'working expenses' payable to Western Indiana, with which paragraphs 5th and 6th of the 1882 Intertenant Agreement dealt; \* \* \*."

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\* The briefs of respondents herein, filed in the Circuit Court, have been certified to this Court.

The only reference to paragraph 37 of the 1902 Lease in their forty pages of argument appears at the bottom of page 58, where they state:

"Not only were the changes intended to be made thus clearly described, specified and enumerated, but paragraph 37 provided (T. 236; Ex. 2; T. 545):" (followed by a quotation of paragraph 37).

This reference, however, was the concluding sentence to an argument to the effect that the changes intended to be made by the 1902 Lease were carefully and exactly stated in that document, and, with one exception—viz., the agreement of November 1, 1891—were limited to the provisions of prior leases. This argument consists of an enumeration of the provisions deemed cancelled or modified by said respondents, the statement that with the one exception noted above such changes were limited to the provisions of prior leases, and the statement that the exact changes intended to be made by the 1902 Lease were carefully and exactly stated and were designed to give each of the five tenant owners equal right of use of the common property upon the payment of equal rental therefor. It is then that the above quoted reference is made. It is clear that that reference was made as a final support to such argument (with which we disagree), which is entirely different from the theory developed by the Court.

Erie's briefs filed in the Circuit Court disclose that, rather than advancing the theory formulated by the Court, its contention was also of an entirely different nature.

Erie never disagreed with the contention of petitioners and the holding of the District Court that the 1902 Lease is the controlling document. At page 85 of its main brief, after having referred to paragraph 33 of the 1902 Lease, Erie states:

"And to show that the rule so provided for was a new rule, the parties provided that it shall go into effect 'from and after the date hereof'."

However, in its argument on the "disputed rentals" issue Erie evidently recognized that the definition of wheelage expenses in paragraph 33 did not include those expenditures, and it sought by a devious argument to carry forward and read into paragraph 33 the broad comprehensive terms used in paragraph 6th of the old 1882 Agreement.

The pertinent portions of this argument, which appears at page 91 of the Erie brief, are:

"The incorporation of covenants of prior leases into the 1902 joint supplemental lease by reference, except as specifically otherwise provided, shows the parties intended to retain the all inclusive character of operating cost.

\*\*\*\*\* When the parties defined 'working expenses' so comprehensively in the 1882 intertenant agreement, it is only natural and consistent to give 'joint expenses' in the concurrent supplemental leases the same comprehensive meaning. When the covenants of the 1882 supplemental leases were incorporated in the 1902 joint supplemental lease by reference, it is natural and consistent to assume that 'operating expenses' and 'the entire cost' of management, operation and maintenance of plaintiff's railroad, buildings and facilities, have as comprehensive and all inclusive a meaning as 'joint expenses' and 'working expenses' had in the earlier agreements."

Paragraph 35 of the 1902 Lease contains provisions incorporating into that lease the provisions of prior leases except as "otherwise expressly provided herein." (R. 235, 544.) It is this provision upon which Erie's foregoing argument of necessity was predicated. Nowhere in its briefs, except in a statement of the facts, did Erie even mention paragraph 37 of the 1902 Lease, either directly or by inference.

Petitioners cite the foregoing argument only to show wherein Erie's position differed from the Court's theory

and do not admit that such argument is valid or correct. Petitioners recognize the impropriety of demonstrating in this brief the errors in the foregoing arguments of said respondents and, therefore, have refrained from so doing.

In its brief filed in the Circuit Court, Western Indiana made no argument as to any of the expense items involved in this petition.

Thus it is clear that the theory upon which the Circuit Court decided the fundamental and controlling question, hereinabove described, was originated by that Court itself.

This Court has granted certiorari where the decision of the Circuit Court has been based on a point neither presented nor argued by the litigants. *LeTulle v. Scofield*, 308 U. S. 415. In that case this Court, speaking through Mr. Justice Roberts, said (p. 416):

“We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence.”

Petitioners have never had any opportunity to argue against or to expose the obvious fallacy in the theory adopted by the Circuit Court before a tribunal so situated that it could receive and consider such arguments with an open mind. Nor was there any necessity for petitioners to do so because, as above stated, none of the litigants raised or urged said theory. It is true that petitioners sought to point out to the Circuit Court its error in their petition for rehearing (R. 732-736); the argument in that petition, however, was of necessity addressed to the Circuit Court only after it had already conceived as its own and had become committed to the fallacious theory upon which it decided the case. At that point petitioners were arguing with the Court rather than with other litigants in this case.

## (2) The Court's Theory Is Patently Erroneous.

Paragraph 37 of the 1902 Lease (R. 236, 545) reads as follows:

"37. No Changes Unless Specified.) Fifteenth. That nothing herein contained shall in any way alter, impair or affect *said existing leases*, or any or either of them, or any matter or thing therein, except as herein otherwise specifically provided." (Italics supplied.)

In developing its theory, the Court adopted as the major premise thereof the mistaken assumption that paragraph 37 referred to and included the 1882 Agreement. It also, throughout its March 17, 1943 opinion, used the words "lease" and "agreement" as though they were synonymous.

The startling proposition which constitutes the Court's major premise—viz., that the 1882 *Agreement* is within the reference in paragraph 37 to "said existing leases"—appears (R. 719; Appendix, 9):

"In view of the express provision above quoted, to the effect that no impairment, no alteration, and no effect of existing *leases* occurred by virtue of this, the 1902 agreement (meaning lease)\*, 'except as herein otherwise specifically provided', we must reject the contention that there was 'a cancellation' or 'an abrogation' of paragraphs 5 and 6 of the 1882 *agreement* by the July 1st, 1902 agreement." (Italics and parenthetical matter supplied.)

The Court then states that the extent to which existing *leases* were otherwise specifically superseded by paragraph 33 of the 1902 Lease must be determined, but it immediately refers instead to the provisions of paragraph 6th of the 1882 *Agreement* (R. 719; Appendix, 9-10).

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\* The Circuit Court in its opinion uniformly refers to the 1902 Lease as an agreement, except in its statement of the facts.

Subsequently, the Court states (R. 720; Appendix, 11):

"Our conclusion is that paragraph 37 of the 1902 agreement is express and explicit in its terms. That paragraph makes it impossible for us to conclude that the agreement of 1902 abrogated the previous existing *agreements* or rights of the lessees. On the other hand, that paragraph expressly sustained all existing *contract* rights not specifically changed." (Italics supplied.)

Thus, the Court's mistaken assumption that the reference in paragraph 37 to "said existing *leases*" includes the 1882 *Agreement* pervades its whole opinion and is the cornerstone upon which its entire theory is built.

The fallacy in this major premise is readily apparent.

In the first place, the reference in paragraph 37 to "said existing leases" relates only to the leases previously enumerated in paragraph 3 of the same 1902 Lease, which is captioned "The Existing Leases". (R. 530-531.) The 1882 Agreement is not there listed.

In the second place, the 1882 Agreement is not a lease at all! No one has ever claimed that it is. It is a contract between the parties of a character entirely different from a lease (R. 196-202). Yet, the Circuit Court throughout its March 17, 1943 opinion has failed to differentiate between the *leases* involved and the *agreements* involved. On the contrary, it has treated and used these two terms interchangeably as though they were synonymous.

In the third place, under the well settled and applicable principle "*expressio unius est exclusio alterius*," the use of the specific term "leases" in paragraph 37 excluded therefrom every then existing agreement which was not a lease.

Lastly, the fallacy in said major premise is further demonstrated by the resolution adopted unanimously by the authorized representatives of the five tenant owners at

their meeting held in July, 1900, which provided that *all existing contracts* between Western Indiana and the five tenant owners be cancelled and that a new agreement be executed by them (R. 780, 828), and further, by the fact that said resolution was carried out and the new agreement therein provided for was in fact formulated and executed, being the January 16, 1902 Agreement (R. 509-518). The aforesaid resolution was part of the newly discovered evidence, sought to be presented by petitioners, but excluded by the Circuit Court in its January 21, 1944 opinion for reasons wholly unrelated to the purposes for which such evidence was offered (R. 946-947; Appendix, 20).

Furthermore, the error in the Circuit Court's theory is not confined to the fallacy in the major premise therof. Its conclusions based upon such premise are equally erroneous.

In its March 17, 1943 opinion the Court states (R. 719; Appendix, 9-10) that "we must read and give effect to paragraph 33 to ascertain the extent that the existing leases were by it otherwise specifically superseded."

It then sets forth paragraph 6th of the 1882 Agreement and italicizes the "all inclusive clause." (R. 719; Appendix, 10.) The Court then says:

"This italicized provision does not appear in paragraph 33 of the 1902 agreement. Specifically, the question is,—Should we, in view of paragraph 37 (1902 agreement) \* \* \* hold that this provision of paragraph 6 was cancelled? \* \* \* Paragraph 37 of the 1902 agreement expressly covers the situation. The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37." (R. 719-720; Appendix, 10.)

But *effect* must be given to paragraph 33; mere lip service is not enough.

Paragraph 33 of the 1902 Lease on its face sets forth a new and limited definition of wheelage expenses and a new and different method of apportioning the same (R. 234-235, 543-544), which definition and method are entirely different from the former definition and method contained in paragraphs 6th and 5th, respectively, of the 1882 Agreement (R. 199-200). Clearly, these provisions come within the exception in paragraph 37 of the 1902 Lease (R. 236, 545). If they do not, then what was the purpose of the parties in including these specific provisions in paragraph 33? It is unthinkable that the parties should carefully incorporate provisions in a lease and then nullify them, wholly or in part, by a later provision in the same document. Furthermore, if such provisions do not come within said exception, what was the purpose of the parties in subsequently executing five later joint leases containing almost identical provisions?

Nor may these provisions of the 1902 Lease be rejected as surplusage. *W. & S. Indemnity Co. v. Industrial Commission*, 366 Ill. 240, 243; *Miller v. Robertson*, 266 U. S. 243, 251. The respondent Erie has not only recognized but insisted upon this point, for in its brief filed with the Circuit Court it said (p. 45):

"Every word and clause of paragraph 33 of the 1902 joint supplemental lease should be given effect and no part thereof should be rejected for lack of meaning or surplusage."

Yet, the effect of the Court's further errors in pursuing its theory is that it has superimposed the general "all inclusive clause" in paragraph 6th of the 1882 Agreement upon the specific and limited provisions of paragraph 33 of the 1902 Lease, thereby "blacking out" and rendering superfluous said later provisions.

The only reason given by the Court to support this result—viz., that the "all inclusive clause" does not appear

in paragraph 33 (R. 719-720; Appendix, 10)—is obviously inadequate for, if it *did* appear therein, it would be a part of the later definition. Its absence therefrom conclusively shows that it was intentionally omitted from the definition in paragraph 33.

We respectfully submit that, in deciding the entire case on a theory both original with the Court and patently erroneous, the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to correct a flagrant error and to prevent a gross miscarriage of justice.

#### POINT II.

**Although the Circuit Court Propounded for Its Ultimate Determination a Single Question, It Entirely Ignored and Failed to Decide Such Question. In So Doing, the Circuit Court Has Again So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Require an Exercise of This Court's Power of Supervision.**

After erroneously assuming that paragraph 37 of the 1902 Lease was controlling, the Circuit Court then stated in its March 17, 1943 opinion (R. 719; Appendix, 9):

“Consequently there is presented only the effect of the 1902 agreement on existing leases.”

(As shown in Point I of this argument, in referring to the 1902 agreement the Court meant the 1902 Lease.)

Nowhere in the opinion is this single question posed by the Court decided or, for that matter, even discussed or again referred to. In fact, no provision of any of “said existing leases” is anywhere set forth or discussed in the opinion except in the Court's statement of the facts.

Instead of answering the question so posed by it, the

Court pursued its own original theory to its eventual decision. The errors in this theory have been fully set forth in Point I of this argument.

Even upon the Circuit Court's own theory that paragraph 37 is controlling, this failure to answer the question stated by the Court is of vital importance since neither the "all inclusive clause" in the 1882 Agreement, under which the Court held the tenant owners liable on a wheelage basis for all of the expenses involved (except the Grand Trunk payment), nor any similar clause is contained in any of "said existing leases" (R. 185-195, 202-208, 217-219).

In view of the complete abandonment by the Circuit Court of this question singled out by it as the "only" question, we respectfully urge that such action constitutes a departure from the accepted and usual course of judicial proceedings requiring the exercise of this Court's power of supervision.

### POINT III.

**The Circuit Court Has Rendered Conflicting Decisions on Separate Appeals, and Conflicting Decisions on the Same Appeals as Well, From the Same Decree, on the Same Stipulated Facts and Involving the Same Instruments. This Is An Even More Serious Conflict Than One Between Decisions of Circuit Courts of Appeal of Different Circuits, and Is a Further Departure From the Accepted and Usual Course of Judicial Proceedings Warranting the Exercise by This Court of Its Power of Supervision.**

The Circuit Court's decision as to which expenses of Western Indiana the five tenant owners are liable for on a wheelage basis was rendered in the three appeals herein sought to be reviewed on the theory that paragraphs 5th and 6th of the 1882 Agreement are the controlling provisions.

In its March 17, 1943 opinion the Court said (R. 719; Appendix, 9) :

“ \* \* \* we must reject the contention that there was ‘a cancellation’ or ‘an abrogation’ of paragraphs 5 and 6 of the 1882 agreement by the July 1st, 1902 agreement.” (meaning lease),

and further, with specific reference to the “all inclusive clause” in paragraph 6th of the 1882 Agreement (R. 720; Appendix, 10) :

“The quoted agreement appearing in paragraph 6 does not come within the exception of paragraph 37. It therefore clearly follows that the lessees are all bound by the above-quoted provision of section six (meaning paragraph 6) and must pay the expenses, such as rent and other items which are the subject of this litigation, on a wheelage basis.” (Parenthetical matter supplied.)

In its March 19, 1943 opinion on the Erie appeal (C.C.A. No. 7878) the Court’s decision was rendered on the theory that paragraph 33 of the 1902 Lease is the controlling provision. In its opinion in that appeal the Court said (Appendix, 13) :

“More specifically it may be said that Erie predicates its argument on the July 1st, 1902 agreement (meaning lease), which is one agreement where the 1882 inter-tenant agreement is specifically changed.” (Parenthetical matter supplied.)

The conflict between the foregoing decisions is readily apparent when it is realized that the Court’s fundamental misconception of the scope of paragraph 37 of the 1902 Lease is the foundation and sole support upon which its entire decision in the three appeals rests.

The opinion of the Circuit Court has unfortunately resulted in a cloak of concealment being thrown over the real issues in the case. When, however, the Court’s erroneous and fundamental misconception as to paragraph

37 is removed, the real inquiry in the case assumes its true and paramount importance. This inquiry concerns the effect, under the applicable rule of law, of paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease upon paragraphs 5th and 6th of the old 1882 Agreement.

The applicable rule of law requires that in a case involving facts like those in the case at bar, the 1902 provisions supersede and abrogate the 1882 provisions *in their entirety*, and that, accordingly, the two separate decisions of the Circuit Court should be identical on this point.

The Court's decisions, however, are not so identical. On the contrary, they are directly opposed!

The result required by the applicable rule of law has been accomplished under the decision in the Erie appeal. That result has not been accomplished under the decision in the three appeals involved in this petition; it has been defeated. Thus, the two decisions are in irreconcilable conflict.

Under the rule of law which petitioners consistently have contended is applicable, the provisions of the 1902 Agreement (as effectuated and carried out by the 1902 Lease) superseded and abrogated all provisions in earlier agreements and leases insofar as the 1902 provisions cover the same subject matter and are inconsistent with the provisions in the earlier instruments.

This rule has been established as the law in the State of Illinois by repeated decisions of the courts of that state, among which are the following:

*Stow v. Russell, et al.*, 36 Ill. 18, 30;

*Harrison, et al. v. Polar Star Lodge*, 116 Ill. 279, 287;

*Lloyd, et al. v. Campbell*, 186 Ill. App. 566, 570-571.

The latest statement of the foregoing rule appears in the last of the three cases above cited, where the Court said, at pages 570-571:

"Appellant asserts the doctrine that when a new contract is inconsistent with an earlier one, so that they cannot subsist together, the latter takes the place of the former; that when the new contract is in regard to the same matter and has the same scope as the earlier contract and the terms of the two contracts are inconsistent, so that they cannot subsist together, the new contract as a general rule abrogates the earlier one and takes the place of so much thereof as is affected by the new contract. This position is undoubtedly correct. 3 Elliott on Contracts, sec. 1865; *Harrison v. Polar Star Lodge*, 116 Ill. 279. So also is appellant's further contention, that when a new contract upon the same subject-matter is entered into by the parties, this works a rescission or abandonment of the previous contract."

The rule was applied by the Supreme Court of Illinois in a case between two of the present litigants involving certain of the same leases and contracts which are the subject matter of the instant litigation (*Chicago & W. I. R. R. Co. v. Chicago & E. I. R. R. Co.*, 260 Ill. 246); and the rule was both stated and applied in 1905 in a similar litigation between all five tenant owners by the same Circuit Court that decided this case (*Grand Trunk W. Ry. Co. v. Chicago & E. I. R. Co.*, 141 Fed. 785).

The District Court found as facts that paragraph Ninth of the 1902 Agreement and paragraph 33 of the 1902 Lease relate to and cover the same subject matter and are inconsistent with the provisions of paragraphs 5th and 6th of the 1882 Agreement and the provisions in prior leases and agreements relating to and defining the expenses of Western Indiana to be paid by the five tenant owners on a wheelage basis (R. 410-411; Appendix, 29). The District Court followed the Illinois law and concluded that the

provisions of paragraph Ninth of the 1902 Agreement and of paragraph 33 of the 1902 Lease did supersede and abrogate the provisions of paragraphs 5th and 6th of the 1882 Agreement, and the various provisions in prior leases, contracts and agreements defining the Western Indiana expenses to be paid by the five tenant owners and providing the basis for apportionment thereof (R. 436; Appendix, 30).

The Circuit Court did not set aside the aforementioned findings of fact; but, due to its untenable theory, the error of which we have fully explained in Point I of this argument, the Court differed with the conclusion of law based upon such findings. Stripped of such erroneous theory upon which its entire decision is grounded, the decision of the Circuit Court in these three appeals is not only in conflict with its separate decision in the Erie appeal, but it is also completely at variance with the aforesaid rule of law and the applicable Illinois decisions.

In addition to the foregoing conflict between the decisions on the separate appeals, there is also a conflict within the decision, as finally rendered by the Court, on the three appeals here in question. In its initial decision of March 17, 1943 the Court held that all of the expense items involved in these three appeals, including the Grand Trunk payment, are payable by the five tenant owners on a wheelage basis by virtue of the provisions of paragraph 6th of the 1882 Agreement. In its subsequent and final decision of January 21, 1944 the Court reversed its holding as to the Grand Trunk payment, and held that such item is payable by the five tenant owners on an equal basis.

The reason which impelled the Court to reverse its position is indeed obscure and cannot be discovered in the language employed by the Court. In its January 21, 1944 opinion the Court said (R. 947; Appendix, 20-21):

"While the argument which led to the conclusion in our opinion, here under review, to the effect that this item, like the others, should be paid for on a wheelage basis, has support, there are, in the applicable written contracts and leases, provisions as to this item which control, and they require this item of cost of operation to be paid by the lessees on an equal basis.

"\* \* \* However, there was an acknowledged, written exception to this method (wheelage) of distributing lessor's costs and expenses. The close and narrow question which was presented, and upon which we reached a conclusion which we now believe was erroneous, was this—Did the item of \$20,665.35 payable to Grand Trunk fall within the provision for working expenses, or was it a capital cost item to be met by the lessees on an equal basis?" (Parenthetical matter supplied.)

It will be observed that the Court's language is most general. It does not state which are the "applicable written contracts and leases," nor does it point out which are the "provisions as to this item which control."

In this same decision the Court rejected the newly discovered evidence offered by petitioners, which is the only evidence that was ever available showing that this item was to be paid on an equal basis. There is no provision in the 1882 Agreement excluding this item from the "all inclusive clause," and the Court has not pointed out any such provision. The only other lease or agreement relating to the definition of wheelage expenses and the method of apportioning the payment thereof to which the Court gives any consideration in any of its opinions is the 1902 Lease.

Since the Court rejected the newly discovered evidence, and since there is no provision in the 1882 Agreement excluding the Grand Trunk payment from the "all inclusive clause," and since the only other contract or lease covering these questions which the Court considers

is the 1902 Lease, necessarily the Court must have reached its final decision as to this item on the theory that it was controlled by said 1902 Lease. Thus the same conflict exists within the decision of the Court on the three appeals as exists between its separate decisions rendered on the different appeals.

We respectfully submit that the foregoing conflict between the decisions rendered by the Circuit Court on the separate appeals as well as the conflict existing in the single decision rendered on the three appeals here in question require the exercise of this Court's power of supervision to correct the Circuit Court's error and to eliminate said conflicts and clarify the law in the Seventh Circuit with respect to these matters. It is also respectfully submitted that the conflicting decisions constitute a further departure from the accepted and usual course of judicial proceedings requiring the exercise by this Court of its power of supervision.

#### POINT IV.

**Although a Declaratory Judgment Was Sought, the Circuit Court Left Undecided Several Questions Which, Although Argued, Are Important Only Because of the Erroneous Decision of That Court. If Upon Review This Court Reverses Such Decision, All of These Questions Will Disappear; Otherwise, Further Litigation Is Inevitable.**

Although Western Indiana sought a judgment declaring and adjudging the rights and liabilities of the parties as to all of the reimbursable expenses of Western Indiana and as to the proper method and means of apportioning the same among the parties liable therefor, several questions, which have become important solely because of the erroneous decision of the Circuit Court, although argued,

were left wholly undecided by that Court. If, however, this Court, upon review, reverses the decision of the Circuit Court, every one of these questions will disappear.

These undecided questions have been fully stated at page 19 of the petition. Three relate to a determination of the proper base to be used in determining the respective wheelage proportions of Western Indiana expenses to be borne by each of the five tenant owners. Another involves the determination of whether Western Indiana's wheelage proportion of its common property expenses is properly included in its separate railway operation expenses (both suburban operations and freight switching). A fifth question is whether the amount to be charged for such separate operations should be (1) the net loss, if any, resulting from such suburban operations and freight switching considered together, (2) the net loss, if any, resulting from either of said operations considered separately, or (3) the gross expenses of both such operations without first deducting any of the revenue derived from such operations.

We recognize the impropriety of discussing these questions on their merits in a brief supporting a petition for certiorari. Accordingly, we shall confine ourselves to pointing out how the failure to decide these questions must inevitably result in further litigation among the parties, and, in the interest of brevity, we shall use for illustration only the question last above referred to.

The views of the six railroads as to these expenses may be summarized as follows:

1. Western Indiana, the lessor, has, since the inception of these separate operations in 1904, taken the position that these expenses are not payable by the five tenant owners at all but that they must be charged to its income or treasury. Until after the commencement of this case, all five of the tenant owners acquiesced in such position.

Petitioners still agree with Western Indiana on this question.

2. Erie, in its counterclaim, for the first time asserted that Western Indiana should be reimbursed by the five tenant owners on a wheelage basis for the net loss resulting from its suburban operations.

3. Grand Trunk and Monon, after having been made third party defendants, for the first time contended that the gross expenses of Western Indiana in conducting both the suburban and freight switching operations are payable by the five tenant owners on a wheelage basis.

In view of these widely divergent positions, it will be impossible for Western Indiana to render bills for such expenses with any expectation that such bills will be paid by all five of the tenant owners. This is particularly true in view of the fact that the liability of each tenant owner will increase or decrease depending upon the answer to the questions left undecided by the Circuit Court.

Accordingly, Western Indiana must decide, as best it can, on which of the foregoing bases it will render these bills, despite the fact that in its pleadings it stated that if the practice pursued by it these many years was not correct, it did not know the proper method of apportioning its expenses, and it therefore specifically requested a declaration by the Court determining such questions (R. 62-64, 375-376).

Whatever method Western Indiana eventually chooses, it is certain that it will not meet the views of one or more of the five tenant owners, who, each being convinced that its position is correct, will resist payment. That further litigation will result is inevitable.

Thus, the decision of the Circuit Court, instead of declaring and adjudging the rights and liabilities of the parties, has left these six railroads to grope in the dark for a solu-

tion to these questions without any light thereon from the Court.

If this Court grants the petition for certiorari and, upon review, reverses the decision of the Circuit Court and upholds the decree of the District Court, *all of these presently undecided questions will disappear.*

The provisions of paragraph 33 of the 1902 Lease which provide the method for determining the proportion of Western Indiana's wheelage expenses payable by each of the five tenant owners,—viz., “\* \* \* their several wheelage uses of the various portions of said railroad to the total wheelage use thereof” (R. 234, 544)—unquestionably include in the base against which the wheelage of each tenant owner is figured the wheelage not only of the five tenant owners but also of each additional user of Western Indiana's common property—E. J. & E., the Belt, Santa Fe, and Western Indiana itself.

Western Indiana's wheelage being properly included in the base for determining the wheelage proportion of each user, Western Indiana itself must bear its wheelage proportion of its common property expenses because that proportion is not chargeable to any lessee.

There is no problem presented in determining whether, under paragraph 33 of the 1902 Lease, all or any part of Western Indiana's separate railroad operation expenses are billable to the five tenant owners on a wheelage basis. These expenses are not within the definition of wheelage expenses contained in said paragraph 33, for that definition is limited solely to the classes of expenses therein set forth, all of which relate only to Western Indiana's common property.

In order that such further litigation may be avoided with the consequent saving in both time and labor to the courts, and so that a complete and final adjudication of

all questions in this case may be had, we respectfully submit that this Court should exercise its power of supervision and allow the writ.

POINT V.

**The Importance of the Case Is Such as to Warrant the Exercise by This Court of Its Power of Supervision.**

The importance of this case has been fully and succinctly stated at pages 23-24 of the petition to which we respectfully refer this Court.

In addition to what is there stated, it is significant that Grand Trunk and Monon have themselves urged the importance of this case. In their reply brief filed in the Circuit Court, they said at page 33:

“Wholly aside from the question of recovery for past transactions, it is of the highest importance that the questions raised in these appeals be definitely settled for the future, a period which, in the contemplation of the parties, will be in excess of 900 years.”

Furthermore, this Court has granted review by certiorari in a case which also involved questions as to the proper division of expenses of a railroad terminal under circumstances quite similar to those in the present case. *Chicago, Milwaukee & St. Paul Railway Company, et al. v. Des Moines Union Railway Co., et al.*, 249 U. S. 595 (decision reported at 254 U. S. 196). The necessity for the review and correction by this Court of the Circuit Court's decision is even greater in the present litigation than in the case cited because the final decision reached will determine the rights and liabilities of the parties hereto over a long future period and, unless corrected, will cause further litigation.

**Conclusion.**

We respectfully submit that the importance of this case, the grave injustice to the petitioners, the irreconcilable decisions rendered by the Circuit Court, and that Court's repeated departure from the accepted and usual course of judicial proceedings require the exercise by this Court of its power of supervision.

We therefore respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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